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Supreme Court, U.S.
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No. 01-4

IN THE

Supreme Court of the United States

WINDSOR HOUSING FOUNDATION,
Petitioner,

v.

ELMER B. LITCHFIELD, IN HIS OFFICIAL CAPACITY AS SHERIFF AND *EX-OFFICIO* TAX COLLECTOR FOR THE PARISH OF EAST BATON ROUGE; FRANK GRANGER III, IN HIS OFFICIAL CAPACITY AS ASSESSOR FOR THE PARISH OF EAST BATON ROUGE, AND THE PARISH OF EAST BATON ROUGE,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of Louisiana, First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Louisiana's requirement that a tax-exempt, nonprofit entity pay an illegally assessed tax, under protest by a deadline, to preserve its right to challenge the tax denies that entity due process under the Fourteenth Amendment to the United States Constitution, as well as under *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), and *Carpenter v. Shaw*, 280 U.S. 363 (1930).

2. Whether the State of Louisiana's post-deprivation tax collection scheme as applied to persons exempt from the payment of taxes abridges the fundamental right of access to the courts as guaranteed by the First Amendment right to petition for redress of grievances and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

RULE 29.1 LISTING

Petitioner Windsor Housing Foundation is presently known as Gateway Housing Foundation. Gateway Housing Foundation has no parent company. Gateway Eden Point, L.L.C., a Louisiana limited liability company, is a wholly-owned subsidiary of Gateway Housing Foundation.

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PETITION FOR A WRIT OF CERTIORARI

Windsor Housing Foundation respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of Louisiana, First Circuit, in this case.

OPINIONS BELOW

The opinions of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, (App. D) and the Louisiana Court of Appeal, First Circuit, (App. C) are unreported. The Supreme Court of Louisiana's orders denying Petitioner Windsor Housing Foundation's applications for a writ of certiorari (App. B) and for reconsideration (App. A) are also unreported.

JURISDICTION

The Court of Appeal of Louisiana, First Circuit, entered judgment on December 22, 2000, affirming the final judgment entered by the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, which dismissed the claims of Petitioner, Windsor Housing Foundation, with prejudice. The Supreme Court of Louisiana denied an application for a writ of certiorari, by a 4-3 vote, on March 30, 2001. The Supreme Court of Louisiana denied an application for rehearing on May 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2000).

STATUTORY PROVISIONS INVOLVED

The text of the following statutory provisions relevant to this petition for a writ of certiorari is reprinted in Appendix E; First and Fourteenth Amendments to the United States Constitution, U.S. CONST. amends. I, XIV, § 1; Article VII, Section 21(B)(1)(a) of the Louisiana Constitution of 1974, LA. CONST. art. VII, § 21(B)(1)(a); Title 47, Sections 2101(A)(1) and 2110(A)(2) of the Louisiana Revised Statutes, LA. REV. STAT. ANN. §§ 47:2101(A)(1), 47:2110(A)(2).

STATEMENT OF THE CASE

The petitioner in this case is Windsor Housing Foundation ("Windsor"), a tax-exempt, charitable organization that has been unconstitutionally subjected to an *ad valorem* tax in direct contravention of this Court's precedent. [1] Windsor's mission is to relieve the burden on the poor and distressed by

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[1] Windsor, currently known as Gateway Housing Foundation, operates as a foreign, nonprofit corporation authorized to do and doing business in Louisiana and is exempt from taxation under § 501(c)(3) of the Internal Revenue Code of 1986, as amended. I.R.C. § 501(c)(3) (West Supp. 2000).

promoting social welfare through the combat of community deterioration. Specifically, Windsor owns and operates a multi-family, residential housing complex in Louisiana in an effort to help the less fortunate. To accomplish its mission, Windsor ensures that low and/or moderate-income families occupy a minimum number of the complex's units, thereby assisting in the social and economic integration of economically disadvantaged residents into the community.

As a tax-exempt, charitable organization, Windsor is *immune* from *ad valorem* taxation pursuant to the Louisiana Constitution. *See* App. E. In particular, the Louisiana Constitution provides that property owned by a nonprofit corporation and operated for charitable purposes is exempt from *ad valorem* taxation. *Id.* Although Windsor maintained tax-exempt status consistent with both federal and state constitutional law, Louisiana unlawfully assessed its property and imposed *ad valorem* taxes on Windsor for the 1998 tax year in the amount of $44,505.00. Windsor did not pay the tax assessment by December 31 of that year. Instead, Windsor paid $45,840.15 in illegally assessed taxes and penalties with interest, "under protest," on or about March 29, 1999. On that date, Windsor provided notice of its intention to file suit for the recovery of these taxes.

Respondent, Sheriff and *Ex-Officio* Tax Collector, Elmer B. Litchfield ("the Collector"), refused to return the tendered sums because Windsor had made its payment under protest *after* the December 31, 1998 delinquency date. The Collector maintained this position in spite of the fact that Windsor was exempt from *ad valorem* taxation under the provisions of the Louisiana Constitution. As a result, Windsor filed this suit within thirty days of its payment pursuant to Louisiana Revised Statute § 47:2110. *Id.*

In response to Windsor's suit, on May 6, 1999, the Collector filed a peremptory exception of prescription/peremption and no cause of action. The Collector urged

the trial court to enforce a December 31 delinquency date and bar Windsor's right to recover based on Louisiana Revised Statute § 47:2101(A)(1), which states that taxpayers who fail to pay their property taxes before December 31 of a given year "may have their property noticed, advertised, and sold." App. E. Windsor opposed the Collector's exception and argued, *inter alia*, that Louisiana's tax collection scheme, as interpreted and enforced by the Collector, violated Windsor's rights under the Fourteenth Amendment to the United States Constitution. Windsor contended further that this scheme, as applied, unfairly burdened its rights as a tax-exempt, charitable organization. In particular, Windsor argued that the State's tax collection practices provided it with an inadequate period of time to protest the tax.

After hearing oral argument on the issue, Judge Curtis A. Calloway of the Nineteenth Judicial District Court for the Parish of East Baton Rouge granted the Collector's exception and dismissed Windsor's constitutionally protected claims, with prejudice, on August 26, 1999. App. D. The District Court did not expressly address Windsor's constitutional arguments in its judgment. *See id.* Windsor subsequently appealed the District Court's judgment to the Louisiana Court of Appeal, First Circuit, renewing its constitutional and other challenges. The Court of Appeal erroneously affirmed the decision of the lower court on December 22, 2000, finding, in part, that the Louisiana tax scheme presented no due process violations under *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990). App. C at 10a.

Thereafter, Windsor filed an application for a writ of certiorari with the Supreme Court of Louisiana. Windsor argued, once again, that Louisiana's tax collection practices, as interpreted and applied by its courts, violated its Fourteenth Amendment rights and unfairly burdened it as a tax-exempt entity. Windsor explained further that the State's tax collection practices discriminated against Windsor by

providing it with an inadequate period of time to protest the tax, which also differed from the amount of time available to taxpayers in other parishes. On March 30, 2001, the Supreme Court of Louisiana denied Windsor's application for a writ of certiorari, without opinion, by a 4-3 vote. App. B. The Louisiana Supreme Court later denied Windsor's application for reconsideration on May 11, 2001. App. A. Windsor now petitions for a writ of certiorari from this Court based on a conflict between the holdings of the Louisiana courts construing Louisiana's tax scheme and this Court's precedent as well as Louisiana's violation of important constitutional rights.

REASONS FOR GRANTING THE PETITION

This case necessitates this Court's intervention because Louisiana's tax collection practices, as interpreted by its courts, run roughshod over this Court's precedent and the First and Fourteenth Amendments. This Court should grant certiorari because Louisiana's post-deprivation scheme for challenging an illegal tax is unconstitutional as applied to tax-exempt entities. The scheme directly contravenes *this* Court's precedent, which establishes that state post-deprivation schemes for the recovery of taxes violate the Due Process Clause of the Fourteenth Amendment when applied to entities wholly exempt from taxation. Additionally, by requiring a tax-exempt entity to pay a tax to protest its illegal assessment, Louisiana impairs these entities' access to the courts and denies them a meaningful opportunity to be heard under the First and Fourteenth Amendments.

I. DECISIONS OF LOUISIANA STATE COURTS IN THIS CASE AND OTHERS CONFLICT WITH THIS COURT'S HOLDINGS IN *McKESSON v. DIVISION OF ALCOHOLIC BEVERAGES* AND *CARPENTER v. SHAW.*

In *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 39 (1990), this Court held that to satisfy the demands of the Due Process Clause of the Fourteenth Amendment, a state must provide taxpayers with both a "fair opportunity" to challenge the legality of a tax and a "clear and certain remedy" for any unlawful tax collection. Although the *McKesson* Court recognized a state's freedom to impose various procedural restraints on *taxpayers*' actions for relief from wrongful taxes, such as relatively short statutes of limitations, the Court also stressed that if the entities were *immune from taxation*, no corrective action by the state could cure the invalidity of the tax. *Id.* at 39, 45. In fact, the Due Process Clause of the Fourteenth Amendment mandates a state's refund of such unlawful taxes. *Id.* at 39.

Louisiana's post-deprivation scheme, as construed by the Louisiana courts, violates the due process demands of *McKesson* by failing to provide tax-exempt organizations a "clear and certain remedy" and a "fair opportunity" to challenge an illegally assessed tax. The relevant Louisiana statutes are neither clear nor certain, but ambiguous, and do not expressly provide that a tax-exempt entity, or any other property owner, waives the right to challenge an illegal tax if it pays the tax under protest after December 31 of a given year. *See* App. E. Nonetheless, one state appellate circuit has read this requirement into the statutory scheme to the detriment of nonprofit organizations that reasonably rely on their tax-exempt status to fulfill their charitable missions. *See Comm-Care Corp. v. Louisiana Tax Comm'n*, 681 So. 2d 1001, 1006 (La. Ct. App. 1996), *rev'd on other grounds*, 706 So. 2d 425, 427 (La. 1998); *see also Capital Drilling Co. v. Graves*, 496

So. 2d 487, 492 (La. Ct. App. 1986). From the standpoint of the average taxpayer reading the statutes in question, the remedy provided by Louisiana is neither clear nor certain.[2] Nonetheless, the Supreme Court of Louisiana has allowed this unconstitutional statutory scheme to be applied *despite the fact that it conflicts with this Court's precedent.*[3]

Indeed, Louisiana does not provide tax-exempt, nonprofit entities with a fair and meaningful opportunity to challenge illegal taxes, as this Court mandated in *McKesson*. Requiring a charitable entity to pay an illegal tax under protest by December 31 of a given year, regardless of when it received the tax bill, precludes many of these entities from ever being able to challenge the tax. Logically, an entity that reasonably believes it will not have to pay a tax will not reserve funds for that purpose; rather, it likely will allocate any available funds toward its charitable mission. Unlike a for-profit corporation, this Court has recognized that nonprofit organizations have traditionally been organized specifically to provide community services, rather than to engage in commerce for the benefit of their shareholders. *Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987). Louisiana unconstitutionally deprived Windsor of $44,505.00 in *ad valorem* taxes and thus prevented Windsor from using this money to improve the quality of housing for lower income residents in Louisiana. Windsor respectfully requests

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[2] In *Reich v. Collins*, 513 U.S. 106, 111 (1994), this Court used the standard of "the average taxpayer" in interpreting the language of the state refund statute.

[3] The Court of Appeal of Louisiana, First Circuit, disingenuously and incorrectly claimed to follow *McKesson*, in this case, by briefly noting that a state could choose to provide *taxpayers* with a post-deprivation remedy for unlawful taxes and that states could subject actions to short statutes of limitations. App. C. at 10a. The Court of Appeal failed to note the language in *McKesson* stating that the post-deprivation rationale did not apply to entities, such as Windsor, wholly immune from taxation. *McKesson*, 496 U.S. at 45.

this Court to rectify the unconstitutional tax collection practices in Louisiana and thereby protect the essential social benefits provided by charitable organizations, such as Windsor, from a constitutionally infirm taxation scheme.

By barring a tax-exempt entity from recovering illegally assessed taxes, the Louisiana courts have not only misapplied this Court's holding in *McKesson*, but have also ignored *Carpenter v. Shaw*, 280 U.S. 363 (1930), and its progeny. In *Carpenter*, a case closely analogous to the present one, the State of Oklahoma illegally taxed land that belonged to tax-exempt Native American tribes. *Id.* at 365. The tribes paid the taxes under protest, and the state alleged that the tribes were precluded from recovering the taxes because they had failed to pay them timely. *Id.* at 369. This Court rejected the state's argument, however, and held that a denial by a state of the right to recover taxes paid by coercion itself contravenes the Fourteenth Amendment. *Id.* (*citing Ward v. Board of County Comm'rs*, 253 U.S. 17, 24 (1920)).[4] The Court held that a failure to follow state procedural requirements could not bar recovery of an illegally assessed tax by an entity that was *wholly exempt from taxation*. *Carpenter*, 280 U.S. at 368.

Like the tribes' property in the *Carpenter* and *Ward* cases, Windsor's property was wholly exempt from the assessment of state *ad valorem* taxes. The tax Windsor was required to pay was illegal from the moment it was assessed. Therefore, Windsor's failure to adhere to the December 31 delinquency date imposed by the Louisiana courts should not have precluded Windsor from recovering its payment.

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[4] The facts of *Ward* are similar to those of *Carpenter* and are also analogous to the facts of this case. In the former case, too, the State of Oklahoma wrongfully taxed land belonging to Native American tribes. *Ward*, 253 U.S. at 18. The Court held that the state's retention of the taxes paid was a violation of the tribes' right to due process of law under the Fourteenth Amendment.

In addition, as in *Carpenter* and *Ward*, Windsor paid the *ad valorem* tax under duress because, by not paying it, Windsor would have risked the forced sale of its property.[5] This Court has long held that, when a tax is paid to avoid financial sanctions or a seizure of real property, the tax is paid under "duress."[6] Interestingly, the *McKesson* Court noted that "courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made." 496 U.S. at 32. This Court should grant certiorari because a state's retention of a tax illegally assessed against a tax-exempt entity is as much a violation of the Constitution as the collection of that tax in the first place. *United States v. State Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), *cert denied*, 454 U.S. 896 (1981). Here, Louisiana has not only illegally assessed Windsor with a tax but has also refused to refund it to Windsor.

The Louisiana tax scheme, as interpreted and enforced by the courts of that state, conflicts with this Court's rulings in *McKesson* and *Carpenter* and, thus, the mandates of the Fourteenth Amendment's Due Process Clause. The precedent established by this Court, in these cases, assures that an entity is not deprived of the property right inherent in its tax-exempt status without due process of law. This Court should also ensure that state tax collectors can no longer send tax bills to entities they know to be exempt and later preclude those entities from recovering their money under a procedural

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[5] According to LA. REV. STAT. ANN. § 47:2101(A)(1) (West Supp. 2000), taxes should be paid on or before the thirty-first of December in each respective year to avoid notice, advertisement, and the sale of the property. App. E.

[6] *McKesson*, 496 U.S. at 39 (*citing United States v. State Tax Comm'n*, 412 U.S. 363, 368 (1973) (economic sanctions for nonpayment of tax)); *Ward*, 253 U.S. at 23 (distress sale of land for nonpayment); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912) (economic sanctions and distress sale of land for nonpayment).

statute that, as discussed below, is arbitrary and unevenly applied. Louisiana's scheme, as interpreted by its courts, is a flagrant violation of *McKesson* and *Carpenter*, and this Court should grant certiorari to address Louisiana's deviation from that precedent.

II. LOUISIANA'S TAX SCHEME ABRIDGES PROTECTED CONSTITUTIONAL RIGHTS.

A. Louisiana's Tax Collection Practices Violate the Due Process Clause of the Fourteenth Amendment.

Tax-exempt status is a vested property right, which, through the dictates of the Fourteenth Amendment, cannot be taken by a state without due process of law. *Ward*, 253 U.S. at 19. Louisiana has deprived Windsor of its tax-exempt status *without due process of law by compelling it to pay an illegally assessed tax* and then denying it the right to challenge and recover the tax because the protest payment was not timely made. "A denial by a state court of recovery of taxes exacted in violation of the Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *McKesson*, 496 U.S. at 34 (*citing Carpenter*, 280 U.S. at 369). The fact that the property right was granted by the Louisiana Constitution and not the United States Constitution is irrelevant: the hallmark of property is an individual entitlement grounded in *state law*, which cannot be usurped except "for cause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).[7]

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[7] Tax-exempt status is analogous to professional licenses, which are property rights granted by the state but which cannot be removed without due process of law under the United States Constitution. *See Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992) (recognizing license to practice medicine as a property right); *Amsden v. Moran*, 904 F.2d 748, 752 (1st Cir. 1990) (recognizing land surveying license as a property right subject to due process protections), *cert. denied*, 498 U.S. 1041.

Louisiana's post-deprivation scheme fails to follow this Court's long-established requirement that every person has the right to a hearing before a deprivation of property under the Due Process Clause. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). This Court has also recognized that postponement of a hearing until post-deprivation is justified only in "extraordinary situations" where a valid governmental interest or a special need for immediate action exists. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Fuentes*, 407 U.S. at 91. These two elements justified the *McKesson* Court's holding that a post-deprivation scheme could be used to secure revenues *from taxpayers*. *McKesson*, 496 U.S. at 37. This rationale fails, however, when applied to *non-taxpayers*, such as charitable organizations, that have not been subject to such a tax in previous years. Because the State and its parishes cannot reasonably rely on collecting these revenues from tax-exempt entities, no legitimate governmental interest in a prompt exaction exists that could justify an exception to the pre-deprivation requirement of the Due Process Clause. Louisiana should not be allowed to circumvent due process requirements by feigning a legitimate governmental interest under the rationale of *Fuentes* and *Boddie*, thereby allowing a taking of property before affording a non-taxpayer the opportunity to be heard.

It is important that the constitutional rights of tax-exempt organizations and others not be abridged at the whim of the state. One of the essential aspects of the American judicial framework, grounded in both law and tradition, is that a person is guaranteed an opportunity to confront the state when it deprives them of life, liberty, or property. *Fuentes*, 407 U.S. at 80-82. In the present case, where no extraordinary circumstances exist, Louisiana's tax collection practices severely infringe on Windsor's right to due process and can only be justified under "extraordinary" circumstances, which are not present here. *See Boddie*, 401 U.S. at 379.

As discussed above, because Windsor's property was wholly exempt from state *ad valorem* taxation in the first place and because Windsor was required to pay the tax under duress and coercion, Louisiana's retention of the illegal tax is a blatant violation of the Due Process Clause of the Fourteenth Amendment. This case directly implicates the protections of the Fourteenth Amendment. Windsor respectfully requests that this Court grant certiorari to scrutinize this unconstitutional system of taxation.

B. Louisiana's Tax Collection Practices Abridge the Fundamental Right of Access to the Courts Under the First and Fourteenth Amendments.

This Court has recognized the constitutionally protected right of access to the courts under the First Amendment to the United States Constitution. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 612 (1972). The historical basis of this right lies in the First Amendment's right to petition the government for a redress of grievances. U.S. CONST. amend. I. Given the history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances, it seems clear that the Framers intended to impose a duty on the government to provide aggrieved parties with a fair hearing. This Court and the United States Courts of Appeals have since embraced and protected this notion—the fundamental right of access to the courts—under the right to petition for a redress of grievances provision of the First Amendment and the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amends. I, XIV, § 1; *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (*citing NAACP v. Button*, 371 U.S. 415 (1963)); *Boddie*, 401 U.S. at 371; *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (*citing Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907)); *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972).

The Due Process Clause requires that a meaningful opportunity to be heard must be provided and that a "mere gesture" is constitutionally inadequate. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). For example, the *Boddie* Court held that requiring an indigent to pay a fee to gain access to the courts to dissolve a marriage did not satisfy the Due Process Clause requirements of the Fourteenth Amendment. *Boddie*, 401 U.S. at 380. The *Boddie* Court noted the historical importance of marriage, a protected interest, and the governmental monopoly of the dissolution of marriages. *Id.* at 376-77. Therefore, a violation of due process of law occurred because, in Connecticut, the only way to obtain a divorce was through the courts. *Id.* This Court recognized that the fee requirement, in *Boddie*, offended due process where it operated to foreclose a particular party's opportunity to be heard. *Id.* at 380.

Louisiana law, as currently applied, requires Windsor, a tax-exempt entity, to pay an illegally assessed tax to preserve its right of access to the courts to contest that tax. If a tax-exempt entity fails or is unable to pay that tax within a small window of time, it is thereafter barred from recovering any payment of that tax, irrespective of whether that payment was made under protest or whether the tax was ever due. In other words, the tax-exempt entity cannot recover the taxes paid even though the assessment was unlawful in the first place. Because property rights are constitutionally protected and the judicial system is the sole avenue of relief to recoup an illegally assessed tax, Windsor's right of access to the courts to redress its grievances is being infringed under this Court's holding in *Boddie*.

A charitable organization under Louisiana's taxation scheme is analogous to an indigent petitioner under *Boddie*. A charitable organization works under the obvious assumption that because it has traditionally been afforded tax-exempt status by federal and state governments, it need not

keep a reserve of money for taxes. Under Louisiana's current tax collection scheme, however, if a tax-exempt entity cannot or does not generate funds to pay an unexpected tax within a small window of time, the State compels the tax-exempt organization to choose between paying the illegally assessed tax, without any available recoupment procedure, or risking the forced seizure and sale of its property. This coercive, post-deprivation scheme precludes any meaningful opportunity to be heard. Where a person is incapable of paying a fee (e.g., indigents) or is immune from paying one (e.g., tax-exempt organizations), the requirement that a fee be paid to gain access to the only avenue of relief denies that person, such as Windsor, its constitutionally protected right of access to the courts to redress its grievance as required by the First and Fourteenth Amendments to the United States Constitution. The toll charged by the State as the price of admission to its courts effectively closes the doors of the courthouse to tax-exempt organizations, such as Windsor.

When a tax-exempt entity, which by definition is *not* subject to an *ad valorem* tax, is assessed a tax, it is counter-intuitive to require that entity to pay the tax as a precondition to contesting the illegally assessed tax. This framework is akin to requiring an indigent to pay a thousand-dollar fee before being allowed to proceed *in forma pauperis*. Such a requirement is not only absurd in its application but also defeats the very purpose behind allowing nonprofit, charitable organizations to be tax-exempt. For a charitable organization, such as Windsor, to fulfill its mission to provide low to moderate-income housing, it must put its money into charitable works. If such an organization is required, instead, to allocate funds for the possibility that the state might arbitrarily and illegally decide to assess it with a tax, that entity will not be able to fulfill its mission, which is the very purpose that afforded it the right to tax-exempt status in the first place. Such a system defies reason and logic.

The current Louisiana scheme places an undue burden on a tax-exempt, nonprofit organization and is subject to serious abuse by a tax assessor. Even if a tax-exempt entity manages to pay an illegally assessed tax under protest before the delinquency date, the charitable entity may be unable to bear the financial burden of litigation expenses to recoup that payment. Alternatively, if the entity fails or is unable to pay the illegally assessed tax by the delinquency date, Louisiana then compels its property owners to choose between two takings of property. Either on the one hand, the entity must pay an overdue, illegally assessed *ad valorem* tax without recoupment proceedings or, on the other hand, have its real property seized and sold for failure to pay the illegitimate *ad valorem* tax. This scheme does not satisfy the minimum requirements of an opportunity to be heard as required by this Court. Rather, Louisiana's tax collection practices subject tax-exempt entities, such as Windsor, to an unconstitutional Catch-22. The due process afforded in this situation is "merely a gesture," at best, and effectively denies a tax-exempt organization a meaningful right of access to the courts. *Mullane*, 339 U.S. at 315. Accordingly, this Court should grant certiorari to determine whether this predatory tax scheme unconstitutionally denies a tax-exempt entity its fundamental right of access to the courts.

CONCLUSION

The State of Louisiana has patently disregarded the mandate of this Court and the Constitution. Louisiana's tax collection practices, as construed and enforced by its courts, have subjected Windsor to a flagrant and improper deprivation of its constitutionally protected rights. These practices directly contravene this Court's holdings in *McKesson* and *Carpenter*, which establish that post-deprivation schemes for the recovery of taxes violate the Fourteenth Amendment's Due Process Clause when applied to tax-exempt entities, such as Windsor. By requiring tax-exempt entities to pay a tax to protest its illegal assessment, Louisiana likewise impairs those entities' access to the courts and denies them a meaningful opportunity to be heard under the First and Fourteenth Amendments.

Indeed, by imposing an *ad valorem* tax on Windsor, a charitable organization *exempt from taxation*, Louisiana's tax collection practices undermine the very purpose for which Louisiana and the federal government granted Windsor tax-exempt status in the first place. Louisiana's taxation scheme, as applied to Windsor (and other tax-exempt organizations), prevents Windsor from fulfilling its charitable mission of providing housing to the economically disadvantaged citizens of Louisiana. As a result, Louisiana's assessment of *ad valorem* taxes on Windsor is not only repugnant to this Court's precedent and the protections afforded by the First and Fourteenth Amendments but also discourages the very charitable works upon which Windsor's tax-exempt status is based. Windsor respectfully requests, therefore, that this Court grant certiorari to address both the conflict between the decisions of the Louisiana courts below and this Court's precedent and the important constitutional issues implicated by Louisiana's egregious, unfair, and coercive tax collection practices.

Respectfully submitted,

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June 28, 2001

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* Counsel for Windsor would like to acknowledge the assistance and contributions of Angela Eddins of Loyola University of New Orleans, School of Law, and Raven Moore and Nicole Tortarolo of Tulane Law School in the preparation of this petition.

APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 2001-C-0189

WINDSOR HOUSING FOUNDATION,

v.

ELMER B. LITCHFIELD, IN HIS OFFICIAL CAPACITY AS SHERIFF AND *EX-OFFICIO* TAX COLLECTOR FOR THE PARISH OF EAST BATON ROUGE, FRANK GRANGER, III, IN HIS OFFICIAL CAPACITY AS ASSESSOR FOR THE PARISH OF EAST BATON ROUGE, AND THE PARISH OF EAST BATON ROUGE.

IN RE: Windsor Housing Foundation, applying for Reconsideration of this Court's Order dated March 30, 2001; Parish of East Baton Rouge, 19th Judicial District Court, Div. J, No. 459,980; to the Court of Appeal First Circuit, No. 99 CA 2626.

May 11, 2001

Reconsideration denied.

PCC

CDK

BJJ

JPV

CDT

JTK

Supreme Court of Louisiana
May 11, 2001

/s/
Deputy Clerk of Court
For the Court

APPENDIX B

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 2001-C-0189

WINDSOR HOUSING FOUNDATION,

v.

ELMER B. LITCHFIELD, IN HIS OFFICIAL CAPACITY AS SHERIFF AND *EX-OFFICIO* TAX COLLECTOR FOR THE PARISH OF EAST BATON ROUGE, FRANK GRANGER, III, IN HIS OFFICIAL CAPACITY AS ASSESSOR FOR THE PARISH OF EAST BATON ROUGE, AND THE PARISH OF EAST BATON ROUGE.

IN RE: Windsor Housing Foundation;—Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. J, Nos. 459,980; to the Court of Appeal, First Circuit, No 99 CA 2626.

March 30, 2001

Denied.

CDK

BJJ

CDT

JTK

CALOGERO, C.J., would grant the writ.
LEMMON, J., would grant the writ.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
March 30, 2001

/s/
Deputy Clerk of Court
For the Court

APPENDIX C

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

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99 CA 2626

WINDSOR HOUSING FOUNDATION,

v.

ELMER B. LITCHFIELD, IN HIS OFFICIAL CAPACITY AS SHERIFF AND *EX-OFFICIO* TAX COLLECTOR FOR THE PARISH OF EAST BATON ROUGE, FRANK GRANGER, III, IN HIS OFFICIAL CAPACITY AS ASSESSOR FOR THE PARISH OF EAST BATON ROUGE, AND THE PARISH OF EAST BATON ROUGE.

On Appeal from the Nineteenth
Judicial District Court (Number 459,980),
Parish of East Baton Rouge, State of Louisiana

JUDGMENT RENDERED:
December 22, 2000

BEFORE: Gonzales, Pettigrew And Edwards,[1] JJ. Gonzales, J.

In this case, a taxpayer challenges a trial court judgment, dismissing its suit for recovery of taxes paid under protest, based on an exception of prescription filed by the tax collector.

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[1] The Honorable Jules D. Edwards, III, Judge, Fifteenth Judicial District Court, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of its petition,[2] Windsor Housing Foundation (Windsor) is a foreign non-profit corporation authorized to do and doing business in Louisiana and is exempt from taxation under §501(c)(3) of the Internal Revenue Code. Windsor owns property in East Baton Rouge Parish, which it operates as a "qualified residential rental project" supplying housing to low and/or moderate income families.

For tax year 1998, the East Baton Rouge Parish tax assessor assessed Windsor with ad valorem taxes in the amount of $44,505.00. On approximately March 29, 1999, Windsor paid $45,840.15[3] under protest to the East Baton Rouge Parish Sheriff and notified the sheriff of its intent to file suit to recover the payment plus interest. Windsor's protest was based on the position that its property was also exempt from state ad valorem taxation pursuant to La. Const. art. 7, § 21(B)(1)(a).

On April 26, 1999, Windsor filed a "Petition to Recover Ad Valorem Taxes Paid Under Protest," naming, as defendants, Elmer B. Litchfield, in his official capacity as Sheriff and Officio Tax Collector for the Parish of East Baton Rouge; Frank Granger, III, in his official capacity as Assessor

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[2] This case came before the trial court on an exception titled "prescription/peremption and no cause of action." The minute entry from the August 16, 1999 hearing indicates the trial court "found that the matte[r] has prescribed and maintained the Exception of No Cause of Action." In ruling upon an exception of no cause of action, well-pleaded allegations of fact must be accepted as true, and the issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Kewaunee Scientific Corporation v. Charles Ragusa & Son, Inc.*, 97-1823 (La. App. 1 Cir. 9/25/98), 723 So.2d 470, 474.

[3] According to Windsor, the amount of $45,840.15 represents the amount of the assessment and interest through March of 1999.

for the Parish of East Baton Rouge; and the Parish of East Baton Rouge.[4] On May 10, 1999, Sheriff Litchfield filed a "Peremptory Exception of Prescription/Peremption and No Cause of Action," claiming Windsor failed to timely pay the protested taxes before December 31, 1998, and its right to protest had therefore prescribed or perempted. After a hearing on August 16, 1999, the trial court signed a judgment dated August 26, 1999, granting Sheriff Litchfield's exception and dismissing Windsor's claim with prejudice.

Windsor appeals from the trial court judgment, urging the following assignments of error:

1. The trial court erred in maintaining the defendant Collector's exceptions of prescription/peremption and no cause of action because the statute under which Windsor's cause of action arises, La. R.S. 47:2110, does *not* require that the subject taxes be paid before December 31 of the given year.

2. The trial court erred in denying Windsor its post-deprivation remedy under La. R.S. 47:2110, constituting a denial of Windsor's due process rights under the Fourteenth Amendment to the United States Constitution.

DISCUSSION

In its first assignment of error, Windsor contends the trial court erred in dismissing its claim, because La. R.S. 47:2110,[5]

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[4] The record does not indicate the status of Windsor's suit against Frank Granger, III, and the Parish of East Baton Rouge. The claims against these defendants are not at issue in this appeal.

[5] Louisiana Revised Statute 47:2110(A) provides, in pertinent part:

> Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give him and the officer

the statute that gives Windsor the right to protest a tax assessment, does not require that the protested taxes be paid before December 31 of the tax year for which the taxes are due. On the other hand, Sheriff Litchfield contends La. R.S. 47:2110 must be read *in pari materia* with La. R.S. 47:2101(A)(1),[6] which requires that all taxes due for a given year be paid on or before the thirty-first day of December in order to avoid the notice, advertisement, and sale of the property.

In *Capital Drilling Company v. Graves*, 496 So.2d 487, 491-491 (La. App. 1 Cir. 1986), this court read La. R.S. 47:2110 and 47:2101(A) *in pari materia* and concluded that payment under protest must be made in the calendar year in which the assessment is made, in order to preserve the right to protest the tax. The *Capital Drilling Company* case was subsequently followed by this court in *Comm-Care Corporation v. Louisiana Tax Commission*, 96-0039 (La. App. 1 Cir. 9/27/96), 681 So.2d 1001. However, the Third

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or agency that has given rise to the cause of action notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall be further held pending the outcome of the suit.

[6] Louisiana Revised Statute 47:2101(A)(1) provides, in pertinent part:

All taxes shall be collected in the calendar year in which the assessment thereof is made, and they shall be designated as the "taxes for the year ____", accordingly as they are collectible, and the taxes assessed in each year shall be due in that calendar year as soon as the tax roll is filed in the office of the recorder of mortgages, ... and they shall be paid on or before the thirty-first day of December in each respective year in order to avoid the notice, advertisement, and sale required by Article VII, Section 25 of the Louisiana Constitution.

Circuit Court of Appeal had previously reached a contrary result in *Comm-Care Corporation v. Bishop*, 95-1246 (La. App. 3 Cir. 3/6/96), 673 So.2d 212. In *Comm-Care Corporation v. Bishop*, 96-1711 (La. 7/1/97), 696 So.2d 969, the Louisiana Supreme Court affirmed the reasoning of this court and reversed the third circuit's opinion. However, on rehearing, the Louisiana Supreme Court "set aside the reasoning and holding" of its original opinion, and decided the case on an issue other than the December 31 payment deadline issue. *Comm-Care Corporation v. Bishop*, 96-1711 (La. 1/21/98) 706 So.2d 425, 426 (on rehearing). Therefore, the validity of this court's holding in *Comm-Care Corporation v. Louisiana Tax Commission*, and the third circuit's holding in *Comm-Care Corporation v. Bishop*, is uncertain. In any event, we remain bound by the *Capital Drilling Company* case, because the "law of the circuit" rule requires that we follow prior decisions of our own circuit. *Graves v. Businelle Towing Corporation*, 95-1999 (La. App. 1 Cir. 4/30/96), 673 So.2d 311, 315. Therefore, based on the reasoning of *Capital Drilling Company*, we conclude the trial court correctly granted the exception, dismissing Windsor's suit against Sheriff Litchfield.

In assignment of error number two, Windsor contends the trial court erred in denying Windsor its post-deprivation remedy under La. R.S. 47:2110, and that such constitutes a denial of Windsor's due process rights under the Fourteenth Amendment to the United States Constitution. In *Comm-Care Corporation v. Bishop*, 96-1711 (La. 7/1/97), 696 So.2d 969, 975, the Louisiana Supreme Court rejected this argument, concluding the procedure provided by La. R.S. 47:2101(A) and 47:2110 presented no due process violations. The court explained:

> Next, we address Comm-Care's argument that their Due Process rights were violated when they were denied relief as per La. R.S. 47:2110. Our decision rendered in

Church Point Wholesale Beverage v. Tarver, 614 So.2d 697 (La. 1993) adequately resolves this argument. Relying on the decision rendered in *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), we found that a state has two options to comply with Due Process. First, a state can provide the avenue of pre-deprivation by allowing the taxpayers the ability to meaningfully challenge the tax before paying it. Secondly, a state can [choose] the option of post-deprivation by affording its taxpayers an opportunity to challenge the validity of the tax and a certain remedy with the following procedural requirements: (1) only taxpayers paying "under protest" would be entitled to relief; and, (2) the actions could be subject to short statute of limitations. . . . (Footnote omitted.)

In no uncertain terms, [La. R.S. 47:2110] provides that a person resisting payment of an amount of ad valorem tax found due shall pay the amount to the proper officer, at which time he shall give to that officer notice of his intention to file suit to recover the tax. Upon receipt of the taxpayer's notice of suit, the officer will segregate the amount and hold it for thirty days. If suit is filed, then that portion of the tax which is being disputed shall be segregated and held pending the outcome of the litigation. In addition to the amount of tax in dispute, the statute further provides the taxpayer interest should he prevail. After reviewing La. R.S. 47:2110, we find that there were no Due Process violations. The only reason Comm-Care was refused a refund was because the corporation voluntarily chose to pay its taxes under protest beyond the time prescribed by R.S. 47:2101(A)(1).

Although this reasoning was subsequently set aside by the supreme court on rehearing, *Comm-Care Corporation v.*

Bishop, 706 So.2d at 426, we find it remains persuasive and adopt it as our own. Windsor's argument that its due process rights have been violated is without merit.

DECREE

For the foregoing reasons, the judgment of the trial court, dismissing Windsor's petition against Sheriff Litchfield with prejudice, is AFFIRMED. Costs of this appeal are assessed to Windsor.

APPENDIX D

[Filed: August 23, 1999]

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

WINDSOR HOUSING FOUNDATION,

v.

ELMER B LITCHFIELD, *et al.*

JUDGMENT

This matter came for hearing on the Sheriff's Peremptory Exception of Prescription/Peremption and No Cause of Action on August 16, 1999. Present were: Leu-Anne Lester Greco, counsel for Sheriff Litchfield; Michael H. Pinkerton, counsel for plaintiff.

Considering the pleadings, the law, and arguments of counsel:

IT IS ORDERED that the Exception be maintained, and plaintiffs' claims be dismissed with prejudice at its cost.

Judgment rendered in open court on August 16, 1999.

Judgment signed in Baton Rouge, Louisiana on this [26th] day of August, 1999.

/s/ Curtis A. Calloway
CURTIS A. CALLOWAY, JUDGE
19th Judicial District Court

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Louisiana of 1974

Article VII.

Section 21. In addition to the homestead exemption provided for in Section 20 of this Article, the following property and no other shall be exempt from ad valorem taxation:

* * * *

(B)(1)(a) Property owned by a nonprofit corporation or association organized and operated exclusively for religious, dedicated places of burial, charitable, health, welfare, fraternal, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or

member thereof and which is declared to be exempt from federal or state income tax;

Louisiana Revised Statutes

Title 47, Section 2101 (A)(1)

All taxes shall be collected in the calendar year in which the assessment thereof is made, and they shall be designated as the "taxes for the year ___", accordingly as they are collectible, and the taxes assessed in each year shall be due in that calendar year as soon as the tax roll is filed in the office of the recorder of mortgages, except taxes on movable property in the event of a bulk sale under the provisions of the Bulk Sales Law, and they shall be paid on or before the thirty-first day of December in each respective year in order to avoid the notice, advertisement, and sale required by Article VII, Section 25 of the Louisiana Constitution. In the event of a bulk sale of movable property under the provisions of the Bulk Sales Law, all taxes due on movable property shall be due ten days prior to completion of the transfer or the payment of any consideration therefor and shall be payable upon completion of the bulk sale. (Footnote omitted).

Title 47, Section 2110 (A)(2)

Any person resisting the payment of any amount of tax due shall pay the amount due to the officer designated by law for the collection of such tax and shall give him, the parish or district assessor, and the Louisiana Tax Commission written notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If a suit is timely filed contesting the correctness of the assessment pursuant to R.S. 47:1856, 1857, or 1998 and seeking the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall

be further held pending the outcome of the suit. That portion of the taxes paid by the taxpayer to the officer which is neither in dispute nor the subject of a suit contesting the correctness pursuant to R.S. 47:1856, 1857, or 1998 shall not be made subject to the protest.